No. 48190-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROGER DALE ST. GEORGE,

Appellant,

vs.

JEANNE ELLEN ST. GEORGE,

Respondent.

BRIEF OF APPELLANT

BENJAMIN R. WINKELMAN
WSBA #33539
Attorney for Appellant
P.O. Box 700
813 Levee Street
Hoquiam, Washington 98550
Telephone (360) 532-5780

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ASSIGNMENTS OF ERROR

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3. The trial court erred in valuing St. George Stores, Inc. based upon mere speculation where both parties testify the value provided by 7-11 is fluid, changes daily, and more specifically the value depends upon future events and contractual contingencies which are not certain to occur; further the court failed to enter sufficient findings to support the valuation.

4. The trial court erred in ordering Mr. St. George to pay nearly twice the amount of spousal maintenance wife requested in her response to the petition for dissolution and initial motion pleadings and further failed to consider the statutory factors related thereto.

5. The trial court erred when calculating the judgment amount against husband as Wife's $1,127 IRA and the Iowa National Financial Services Insurance of $2,392 were awarded to wife and not reduced from the judgment. As well the community debts Mr. St. George was ordered to pay are not reduced from the balance of the equalization judgment.

6. The trial court erred by not reimbursing Mr. St. George for making the mortgage, tax and insurance payments on the family home for 13 months after separation and until the decree was entered, where wife agreed at trial he should be reimbursed and his separate

efforts and income reduced the principle balance of the mortgage.

7. The trial court erred in failing to make a just and equitable division of assets and liabilities as required by R.C.W. 26.09.080.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court decreed that the wife had a separate real property interest in the real estate located in Colorado, though the interest was acquired during the marriage and no evidence was presented by wife to rebut the presumption the characterization of the interest was community. Is a trial court required to find evidence to rebut the presumption for characterization of property in a dissolution proceeding? (Assignment of Error Nos. 1, 2 and 7)

2. The parties agreed and presented undisputed testimony that the subject corporation had a goodwill value of $300,000. The court added $247,400 in value to the corporation based upon a contract expectancy in the face of evidence that there were numerous contractual contingencies to remain eligible to receive said contract expectancies and the value is speculative in nature and set by the franchise at the time of a sale. Is the trial court allowed to assign value to contract expectancies based upon some future event, rather than award the expectancy and order a division after the triggering event allows the party to recognize the value? (Assignments of Error Nos. 3 and 7)

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7. Does the mischaracterization of property and dramatic change in the value of the corporation require remand for further proceedings? (Assignments of Error Nos.1-7)

B. STATEMENT OF THE CASE

The parties were married August 12, 1972 and the parties separated on August 18, 2014. (CP 105) The dissolution petition was filed on August 20, 2014. (CP 1) The trial was held on January 10, 2015 and the court ruled from the bench at the conclusion of the trial. (RP 205-215) Upon presentation of orders and the filed objections and exceptions of Mr. St. George, the court sua sponte, reversed portions of its ruling and it took several months and many court hearings to get the final orders entered in September 2015. (CP 62-103) The parties have two adult children whom are not dependents. (CP 107)

Mr. St. George is employed by St. George Stores, Inc., which owns and operates three

franchise 7-11 convenience stores in Grays Harbor County, Washington. (RP 97-98) Mr. St. George has also worked as an elected officer for the national 7-11 Franchise Owners Association. (RP 98) His most recent term ended in 2015 along with the $12,500 annual compensation he received related to that elected position. (RP 42 and 99) Mr. St. George's net income was approximately $6,975.00 per month at the time of trial, however Mr. St. George had been acting as general manager for the business since he lost his general manager in July 2014 and therefore increased his monthly pay by $2,000.00 due to the substantially increased amount of his time and effort necessary to run the stores. (RP 98-103 and Trial Exhibit 18) Mr. St. George showed evidence his average net monthly pay in 2014 was $4,577, which included the $12,500 as an elected official for national 7-11 franchise owners. (Trial Ex. No. 18) The general manager who left in July 2014 was paid $1000.00 per week and this monthly savings

was attributed to the corporation all due to the increased labor of Mr. St. George. (RP 63-64) Once Mr. St. George replaces his manager he testified that he would reduce his monthly net income by approximately $2000.00 Mr. St. George's average monthly net income will then be $4,975.00. (RP 63-64 and CP 42-51) Mrs. St. George alleged that her husband's monthly income is over $10,000 per month, but produced no evidence to support her allegation. (RP 68 and CP 26-34)

Mrs. St. George has generally handled the deposits for the stores and was compensated a weekly amount of $150.00 for doing so. (RP 34, Lns. 21-23) There have been protracted periods of time that Mrs. St. George was generally responsible for all operations of the stores while Mr. St. George was unavailable. (RP 41) Some of these occasions were for months at a time. (RP41) At separation Mrs. St. George quit making the business deposits or having anything

to do with the stores. (CP 32) Mrs. St. George is in general good health and testified that she could get employment and refused to do so. (RP 36,37) Mr. St. George is older than Mrs. St. George and he suffered heart damage and remained under the care of a cardiologist to the date of trial. (RP 37 and 76) Mrs. St. George was living in the community home and receiving $1,350.00 monthly as temporary spousal maintenance from soon after separation until after the date of trial and eventual sale of the home. (CP 22-24 and 104-115) On September 10, 2014 the court entered temporary orders, which required Mr. St. George to pay temporary spousal maintenance of $1,350 per month, as well as almost all of the remaining community obligations. (CP 22-24) The Decree requires Mr. St. George to pay $2,243 in monthly spousal maintenance. (CP 114) Mr. St. George was also ordered to pay the mortgage payments, credit cards, health insurance, and life insurance and was required to continue to

work and maintain the business. (CP 22-24) Mrs. St. George had at the time of trial nearly $70,000 cash on deposit in banks, most of which she claimed as separate property, alleging she had inherited the money. (RP 35; CP 13 Lns. 11-19 and CP 24) Mrs. St. George produced no evidence to prove she inherited the money she removed from the parties' joint checking account on or about August 15, 2014. (CP 13 and CP 24) After separation Mr. St. George had to reside in a hotel before finding the rental home where he now resides and he continued to pay almost all of the expenses while Mrs. St. George resided in the community home and refused to seek employment. (RP 36) Mrs. St. George is in generally good health while Mr. St. George is older and has heart problems. (RP 37 and 38) Mrs. St. George started receiving her own Social Security Income of $700 per month in February 2015. (RP 36)

In 1992 the parties purchased the B Street 7-11 and operated as a sole proprietorship. In

1993 the parties purchased the Boone Street 7-11 and operated as a sole proprietorship. In 1997 the parties purchased the Lincoln Street 7-11 in Hoquiam and operated as a sole proprietorship. In 1999 the parties incorporated under the name of St. George Stores, Inc. which owns and operates all three locations today. Each of the parties own 50% of the shares of St. George Stores, Inc. (Trial Exhibits 15, 16 and 17)

The parties were purchasing a community home on Washington Court in Hoquiam, Washington. The property was appraised at $275,000.00 near the time of trial. (Trial Exhibit 26). The trial court ordered the home to be sold and the proceeds to be paid entirely to Mrs. St. George. (CP 112) The mortgage had a balance at the time of separation of $80,567. (Trial Exhibit 23) Mr. St. George paid the mortgage for 13 months with his separate taxable income and reduced the principle balance by more than $11,000 before the property was sold. (Trial Exhibit 23) Mrs. St.

George always took the position that Mr. St. George should be compensated for these payments and agreed that he should be reimbursed. (RP 29-30 and 89-90) The court did not factor this reimbursement into the calculation of the equalization judgment in the Decree and failed to order the reimbursement.

Although there were other assets and liabilities involved in the case the primary issue at trial was the valuation and division of the parties' interest in the corporation St., George Stores, Inc. as well as the characterization of the separate or community property interests before the court. (CP 26-58) The court gave Mr. St. George an ultimatum ordering him to wind up the corporation and to divide the proceeds, even in the face of evidence that the corporation required franchise consent and even with ready buyers would take a protracted period of time to accomplish, *OR* pay Mrs. St. George for the future expectancy value

of the business. (RP June 25, 2015, Pg. 17, Lns.15-20) The trial court ultimately valued the corporation on speculative contract expectancies and entered a judgment against Mr. St. George to compensate Mrs. St. George for one half of the value of the corporation, including the speculative future value of the tenured franchise rebate subject to future events and contingencies. (CP 11-15) Both parties agreed that the number the court adopted from a proposed settlement agreement (Trial Exhibit 29) was speculative and changes day-to-day or month-to-month. (RP 74, Lns.6-14 and 93) Mrs. St. George agreed with Mr. St. George the value of the tenured rebate comes from the 7-11 franchise, fluctuates day to day and is fluid and only received after certain future events are to occur and that the tenured rebate was at risk. (RP 74, 75, 81, 93 and 146.) The parties both testified that they had written agreements that governed the terms of the tenured rebate and the franchise

and those agreements were entered into evidence. (Trial Exhibits 27 and 34)

The issues on appeal relate to the trial court's decisions as to the characterization and value of property and the method the trial court chose to compensate wife for her interest in the business. The parties agreed that they could not afford to have the business professionally appraised. The parties agreed to the goodwill value of the company. *In an effort to settle the case*, Mr. St. George sent an email to Mrs. St. George that stated that there was a tenured rebate value established by the 7-11 Franchisor on or about the date of the inquiry. (Trial Ex. 29) Both parties agreed that there were a number of contingencies and that the value of the tenured rebate was not stable and had to be requested from the 7-11 Franchisor. Since no formal appraisal was completed on the corporation, the court took testimony from both of the parties at trial. The trial court adopted the value set forth in the

settlement email (Trial Exhibit 29) although all evidence and testimony was that the value was a snap-shot in time, subject to change, was at risk and had numerous contingencies that had to be met in order to have any value at all. Those contingencies are set forth in Trial Exhibits 27 and 34 and Mr. St. George testified with examples argued below. Because the value of the tenured rebate only becomes available after certain future contingencies and the value is unknown by its nature, Mr. St. George suggested the valuation of the tenured rebate be removed from the equalization judgment entered against him and rather that he be ordered to split the rebate received, if any. (RP 296 and 297) The court rejected this proposal.

The trial court failed to consider the $1,127 IRA (Trial Exhibit 12) or the Iowa National Financial Services Insurance policy with a face value of $2,392 (Trial Exhibit 11) awarded to wife while calculating the equalization judgment. Mr. St. George was also not credited for the payment of

the $13,000 CitiCard balance he was ordered to pay in the decree. (CP 110 and 113)

C. ARGUMENT

Standard of Review and General Rules

A trial court's characterization of property as separate or community presents a mixed question of law and fact. *In re Marriage of Martin,* 32 Wash.App. 92, 94, 645 P.2d 1148 (1982). "The time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact." *Id.* at 94, 645 P.2d 1148. We review the factual findings supporting the trial court's characterization for substantial evidence. *In re Marriage of Mueller,* 140 Wash.App. 498, 504, 167 P.3d 568 (2007). The ultimate characterization of the property as community or separate is a question of law that we review de novo. *Id.* at 503-04, 167 P.3d 568. *In re Marriage of Kile &*

Kendall, 186 Wash. App. 864, 876, 347 P.3d 894, 900 (2015).

A party challenging a property distribution must demonstrate that the trial court manifestly abused its discretion. *In re Marriage of Washburn*, 101 Wash.2d 168, 179, 677 P.2d 152 (1984); *In re Marriage of Terry*, 79 Wn.App. 866, 869, 905 P.2d 935 (1995). The appellate court will find a manifest abuse of discretion when the trial court exercises its discretion on untenable grounds. *In re Marriage of Olivares*, 69 Wn.App. 324, 328, 848 P.2d 1281 (1993).

In a dissolution action, the trial court must make a "just and equitable" distribution of the property and liabilities of the parties after considering all relevant factors, including the nature and extent of the separate and community properties and the duration of the marriage. RCW 26.09.080. The trial court's paramount concern when distributing property in a dissolution action is the economic condition in

which the decree leaves the parties. *In re Marriage of Williams*, 84 Wn.App. 263, 270, 927 P.2d 679 (1996), review denied, 131 Wash.2d 1025, 937 P.2d 1102 (1997); RCW 26.09.080.

In performing its obligation to make a just and equitable distribution of properties and liabilities in a marriage dissolution action, the trial court must characterize the property before it as either community or separate. *In re Marriage of Gillespie,* 89 Wash.App. 390, 399, 948 P.2d 1338 (1997); *Pollock v. Pollock,* 7 Wash.App. 394, 399, 499 P.2d 231 (1972). The status of the property is determined "as of the date of its acquisition." *In re Marriage of Shannon,* 55 Wash.App. 137, 140, 777 P.2d 8 (1989).

Because Washington law favors community property, "all property acquired during marriage is presumptively community property, regardless of how title is held." *Dean v. Lehman,* 143 Wash.2d 12, 19, 18 P.3d 523 (2001); RCW 26.16.030. "The burden of rebutting this

presumption is on the party challenging the asset's community property status, and 'can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property exception.' " *Id.* at 19-20, 18 P.3d 523 (citation omitted) (quoting *Estate of Madsen v. Comm'r,* 97 Wash.2d 792, 796, 650 P.2d 196 (1982), *overruled in part on other grounds by Aetna Life Ins. v. Wadsworth,* 102 Wash.2d 652, 659-60, 689 P.2d 46(1984).

R.C.W. 26.09.080 provides:

> "In a proceeding for dissolution of the marriage, legal separation, ... the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
> (1) The nature and extent of the community property;
> (2) The nature and extent of the separate property;
> (3) The duration of the marriage; and
> (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable

periods to a spouse having custody of any children."

In addition to the four subsections in R.C.W. 26.09.080, which include "[t]he economic circumstances of each spouse at the time the division of property is to become effective," the court should also consider the age, health, education and employment history of the parties and their children, and the future earning prospects of all of them in determining a just and equitable division. *DeRuwe v. DeRuwe*, 72 Wash.2d 404, 408, 433 P.2d 209 (1967); *In re Marriage of Rink*, 18 Wn.App. 549, 551, 571 P.2d 210 (1977).

When the parties are both without fault, the community property should be divided more equally than two thirds of it to one and one third to the other. *Wills v. Wills,* 50 Wn.2d 439, 312 P.2d 661 (1957)

Argument of Assignment of Error Nos. 1 & 2

A significant issue in this proceeding

involved characterization of property separate or community. Because Washington law favors community property, "all property acquired during marriage is presumptively community property, regardless of how title is held." *Dean v. Lehman,* 143 Wash.2d 12, 19, 18 P.3d 523 (2001); RCW 26.16.030. "The burden of rebutting this presumption is on the party challenging the asset's community property status, and 'can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property exception.' " *Id.* at 19-20, 18 P.3d 523 (citation omitted) (quoting *Estate of Madsen v. Comm'r,* 97 Wash.2d 792, 796, 650 P.2d 196 (1982), *overruled in part on other grounds by Aetna Life Ins. v. Wadsworth,* 102 Wash.2d 652, 659-60, 689 P.2d 46(1984)).

The Colorado Real Estate: Washington accepts the principle that the character of property is determined under the law of the state in which the couple is domiciled at the time of

its acquisition. *In re Marriage of Landry,* 103 Wash.2d 807, 810, 699 P.2d 214 (1985); *Rustad v. Rustad,* 61 Wash.2d 176, 179, 377 P.2d 414 (1963) cited further by *In re Marriage of Smith*, 158 Wash. App. 248, 259, 241 P.3d 449, 454 (2010).

In the case at hand Mrs. St. George testified that she received an interest in the Colorado real property by being added to the deed more than 10 years prior to the petition to dissolve this marriage as was evidenced by the Deeds admitted as evidence at trial. (RP 38, Lns. 7-13; Trial Exhibit No.13.) This evidence that the property interest was acquired during the marriage makes it presumptively a community interest and Mrs. St. George offered no evidence or testimony to rebut the presumption. She simply referred to the property as an inheritance in her testimony. Mrs. St. George failed to meet her burden of providing clear and convincing proof that the transaction falls within the scope of a separate property exception and thereby

failed to rebut the community presumption on the property interests she obtained in the Colorado real property. Mrs. St. George testified that the property was pending sale at the time of trial and that she is receiving $40,000 for her interests in the Colorado Real Property. (See RP Pg. 58, Lns.4-17 and RP Pg. 81, Lns. 1-5.) The court erred by awarding this property to Mrs. St. George as her separate property.

The Bank Accounts Held as Joint Tenant with Right of Survivorship: In the case at hand Mrs. St. George testified she became an account holder as a joint tenant with right of survivorship on the bank accounts with her father long before the petition for dissolution was filed and that interest was obtained while her parents were alive and that it could have been in 2008 when she became a joint owner. (See RP Pg. 38, Ln 14 to Pg. 39 Ln.10.) Upon creation of a "joint tenancy," each tenant takes complete, undivided interest in the whole. *Matter of Estate of*

Politoff (1984) 36 Wash.App. 424, 674 P.2d 687. *Wash. Rev. Code Ann.* § 64.28.010. When Mrs. St. George acquired her complete, undivided interest in the whole account in Colorado the parties were married and the account is therefore presumptively a community asset without clear convincing proof that the transaction falls within the scope of a separate property exception. Mrs. St. George offered no evidence to rebut the community property presumption and therefore the trial court erred by finding the money from the joint account was separate property of Mrs. St. George. Further, Mrs. St. George declared in her sworn statement to the court that she took the money from the joint tenant account ($65,000) held with her father and deposited it into the community checking account she held jointly with Mr. St. George in the Spring of 2014. (CP 13, Lns. 11-19.) After motion hearings the trial court found and ordered that Mrs. St. George shall not remove any further

funds from the community joint checking accounts or corporate accounts other than the $60,000+ she removed on or about Friday August 15, 2014. (CP 24, Lns. 12-14.) This money was taken from one joint account with her father and deposited into and comingled in the account she shared with Mr. St. George as tenants with right of survivorship. Although this money was already presumed to be community she further comingled the assets and failed to thereafter produce any evidence whatsoever to trace the funds. Mrs. St. George testified at trial that she still had this cash on deposit. (RP Pg. 81, Ln 1.) In the event the court were to find Mrs. St. George somehow rebutted the presumption she then comingled the funds by depositing them into the joint account with her husband. If the property was separate property at the time of acquisition, it would retain that character as long as it can be traced and identified. Baker v. Baker, 80 Wash.2d 736, 745, 498 P.2d 315 (1972). In the instant case,

even if Mrs. St. George had rebutted the presumption she then deposited the monies into a joint account with her husband and paid personal and business expenses from that account. Mrs. St. George presented no evidence to trace those funds in any way. St. George failed to provide any evidence whatsoever to rebut the community presumption or to trace any funds from these accounts and therefore the court erred in awarding these accounts to Mrs. St. George as her separate property. Factual findings upon which the court's characterization of separate or community property is based in a marriage dissolution proceeding may be reversed here because they are not supported by substantial evidence. In this case the evidence is to the contrary. In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000).

Argument of Assignment of Error No. 3

It is undisputed that the parties each own a 50% interest in the Corporation, St. George

Stores and each owned one half of the shares issued by the corporation. (RP Pg. 97, Lns. 4-19; Trial Exhibits 15, 16 & 17) The trial court in this case determined the value of the corporation St. George Stores Inc. to be $547,400. (CP 110) This value includes an agreed upon valuation of $300,000 for goodwill and a court finding that a tenured franchise rebate added value of $247,400. The court gave conflicting explanations of its method of arriving at the value, but ultimately adopted trial Exhibit 29 to value the business.

The parties testified as to their belief of the value of the business. "The decisional law leaves no room for doubt that the owner may testify as to the value of his property because he is familiar enough with it to know its worth." The quotation is from *Cunningham v. Town of Tieton*, 60 Wash. 2d 434, 374 P.2d 375 (1962); See also *Risdon v. Hotel Savoy Co.*, 99 Wash. 616, 170 P. 146 (1918) (owner of business testified as to

value of good will). Owners, for example, are normally allowed to state the value of their own property in marriage dissolutions and similar family law proceedings, even if the testimony directly contradicts the values established by experts. See, e.g., *In re Marriage of Stenshoel,* 72 Wn.App. 800, 866 P.2d 635 (1993). There are no expert valuations of the business in this case. The real properties of all three locations are leased and not owned by St. George Stores, Inc. There is a disagreement as to whether any value is added by a tenured rebate option referred to by the parties as a tenured franchise rebate.

Both parties testified that the tenured rebate value of $247,400, was provided by 7-11 for a date certain sale; was fluid and changed daily. Both parties testified that they executed a written agreement with the 7-11 franchise outlining the terms of the tenured rebate. The written agreement had numerous conditions

precedent to receipt of the tenured rebate and states other reasons the tenured rebate may not be received at the time of a sale. (See trial Exhibits 27 and 34.) In addition the 7-11 franchise has a first right of refusal and Mr. St. George described in his testimony that the 7-11 franchise could purchase the store if they wish and avoid the franchise fee entirely. (RP 104, Lns. 1-12.) Mr. St. George further testified on a number of breach issues that would lead to the loss of the tenured rebate consistent with the written agreement and identified numerous occasions where the business was cited with breach. (RP 104, ln. 15 - Pg. 106 ln 24) Some of the breach conditions are set forth in the franchise agreement. Mr. St. George always took the position with the court that the tenured rebate was speculative and had many conditions precedent as set forth in his trial brief. Both parties testified the value changes consistently and would only be received upon satisfaction of

many conditions by contract. Mr. St. George testified giving examples of franchises losing their tenured rebates by catastrophic loss. (RP 113 and 114) Trial Exhibit 34 is the franchise agreements of the parties and each of the three locations has an identical agreement. (RP 114 lns. 8-24) One location is suffering dramatically by competition. (RP 128 - 130) and required placing additional funds in to keep the contractual equity to avoid a breach in the franchise agreement. Mr. St. George described the risky breaches further on cross examination and gave examples of close calls and citations in the St. George locations. (RP 150) He further described cars crashing through the stores, which has happened on multiple occasions at these locations and how such an event could lead to the loss of the tenured rebate. (RP Pg. 164) The testimony and exhibits offered at trial proved this "settlement valuation" in trial exhibit 29 was on a date certain and speculative, offered

only in an effort to propose a value to avoid the cost and trial associated with establishing a value. The court's adoption of the emailed settlement proposal in light of all the testimony from both parties stating the number was fluid and subject to conditions amounted to disregarding factors relevant to value, including the effect of value on the restrictions as well as the right not being assignable. While the trial court has broad discretion in this area, its discretion does not extend to completely overlooking factors material to the determination. Both parties testified that they had not discussed selling the businesses and upon cross examination of Mr. St. George at trial he testified that he had not contemplated a sale other than to see if there was interest and didn't expect to retire for years.

The court erred where it valued the business based upon mere speculation and the evidence presented at trial was specific as to

contingencies and identified risk of loss of the tenured franchise rebate.

Values that Depend on Future Events

All asset values (even cash) change over time, but for some assets, the current value of the asset is based on an assessment of the value the asset will have at an unspecified time in the future.

One example is a stock option. Under the present-value approach to option valuation, the court attempts to determine the maximum value an option will have over the term of the option (as the market value of the stock for which the option was granted increases, the value of the option increases). Experts have developed a variety of models for calculating the present value under this approach. The most widely known model, the Black-Scholes formula, is "a complex method that reflects the interrelationship between market value and exercisability by taking into account eleven different variables." Two

other models, the Shelton model and the Kassouf model, rely on "regression analysis of historical relationships among economic variables to estimate statistically the expected value of the option." *Farmer v. Farmer*, 172 Wash. 2d 616, 627-28, 259 P.3d 256 (2011). The Farmer court noted, "[S]ome courts are reluctant to wade into the economic morass of ascertaining a present value for stock options and instead defer any valuation until the options are exercised at some point in the future. Under the retained-jurisdiction approach, for example, the court does not grant a lump-sum cash award at dissolution but instead retains jurisdiction over the property distribution until the holder cashes in the options, at which point the court enforces an equitable distribution of the proceeds. Similarly, under the deferred-distribution approach, the court allocates rights in the stock options at the time of dissolution but refrains

from making any award until the holder exercises the options at a later date." 172 Wn.2d at 628.

Another example of an asset that may be valued based on its possible future value is a legal claim, or potential legal claim. While the range of value for certain types of legal claims can be determined with a reasonable degree of confidence, many legal claims are impossible to value until they have been resolved. For such claims, the court will either award each spouse a 50% interest in the claim, or distribute the claim to one spouse with the duty to pay 50% of any recovery to the other spouse, after deducting the costs of prosecuting the claim.

In this case the court could have awarded the tenured franchise rebate to Mr. St. George with an obligation to pay one half to Mrs. St. George, if any is ever received. Neither party would benefit from use of the asset until the tenured rebate was received, if any. Mr. St. George suggested this remedy which was rejected

by the trial court. (RP 296 and 297) This allows the parties to share the risk of losing the tenured rebate. If the current Decree is upheld then Mr. St. George is burdened with the equalization judgment amount which is speculative and could be lost for various reasons, but his obligation to pay on a speculative value would survive. This cannot result in a fair and equitable division of the assets in this case. The court should have ordered any future receipt of the tenured rebate to be divided evenly.

Argument of Assignment of Error No. 4

The court erred by ordering Mr. St. George to pay a significant amount of spousal maintenance for an indefinite period of time in addition to awarding Mrs. St. George nearly all of the assets. A significant issue of dispute in this case was to address the appropriate amount of spousal maintenance and for what time period the support would be paid.

In determining whether to award maintenance the court considers: (1) the financial resources of the party seeking maintenance; (2) the time necessary for the party seeking maintenance to acquire education and training to find employment; (3) the standard of living during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition, and the financial obligations of the party seeking maintenance; and (6) the ability of the party against whom maintenance is being sought to pay support. RCW 26.09.090. In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award. *Endres v. Endres,* 62 Wash.2d 55, 56, 380 P.2d 873 (1963); *Cleaver v. Cleaver,* 10 Wash.App. 14, 20, 516 P.2d 508 (1973).

Mrs. St. George with the assistance of her legal counsel requested spousal maintenance in the amount of $1,500 per month for the rest of

her life. This request is found both in her Response to the Petition for Dissolution of Marriage in this case as well as in her Declaration dated August 25, 2014. (See CP 10 and 13.) After oral argument of the motion, the court entered a temporary order dated September 10, 2014 that ordered Mr. St. George to pay spousal maintenance of $1,350 each month. Mr. St. George paid said amount until the entry of the final Decree in this case. The Decree in this case awarded almost all assets other than the business to Mrs. St. George, all of the proceeds of the sale of the house and all of the property she claimed to have inherited. The Decree requires Mr. St. George to pay $2,243 in monthly maintenance. (CP 114)

Finally, awarding maintenance for an indefinite duration is reversible error without a finding that the recipient is incapable of earning an adequate income. *In re Marriage of Valente*, 179 Wn. App. 817, 320 P.3d 115 (2014);

In re Marriage of Mathews, 70 Wn. App. 116, 853 P.2d 462, *rev. denied,* 122 Wn.2d 1021 (1993); *Hogberg v. Hogberg*, 64 Wn.2d 617, 393 P.2d 291 (1964). The evidence at trial does not support a finding Mrs. St. George is incapable or earning an adequate income, in fact both parties testified that she was of general good health, had worked before and was capable of obtaining employment. When considering the statutory factors, the amount of monthly spousal maintenance should have been significantly lower than ordered. The court failed to enter sufficient findings to support the award and abused its discretion in amount and duration.

Awarding maintenance that extends beyond retirement is generally not appropriate. *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). In this case the trial court ordered Mr. St. George to pay spousal maintenance beyond his retirement and even ordered that the spousal maintenance

would continue even after Mr. St. George only has social security as his only source of income.

Argument of Assignment of Error No. 5

The trial court was presented with evidence of certain debts and assets that were awarded to the parties, which were not calculated into the equalization judgment entered in favor of Mrs. St. George. (See CP 110) *RCW 26.09.080* requires the court to dispose of all assets and liabilities. The court ordered that the equalization payment would reflect a 50/50 division of the community assets. The marital lien document (CP 110) was created by counsel for Mrs. St. George and failed to include the proper value of the IRA awarded to wife and also misidentified the IRA as being held at the Bank of the Pacific, when it is actually held at the Bank of America. (Trial Exhibit 12) Further the Iowa National Financial Services Insurance policy has a face value of $2,392, was awarded to wife and not considered in factoring the marital lien

in this case. (Trial Exhibit 11) Mr. St. George was ordered to pay $13,000 owed on the Citibank card (Trial Exhibit 25), however, this too is left off of the calculation of the marital lien or equalization judgment calculated by the court at CP 110 and entered as a judgment in the decree. (CP 111) These items should have been considered in the calculation of the marital lien and the court erred by leaving them out. Additionally, those credits argued in the other assignments of error herein are restated here.

Argument of Assignment of Error No. 6

The trial court ordered Mr. St. George to pay the mortgage, tax and insurance on the community home after the date of separation up until the court ordered sale of the home. (CP 22-25) Mr. St. George was removed from the family home and Mrs. St. George lived there until the property was sold. (CP 23) The mortgage, tax and insurance were all paid with the fruits of Mr. St. George's labor after the date of

separation. Assets acquired during a marriage are presumed to be community property. *In re Marriage of Short*, 125 Wash.2d 865, 870, 890 P.2d 12 (1995). This presumption may be rebutted by showing the assets were acquired as separate property. *Id.* Spouses' earnings and accumulations during a permanent separation are considered separate property. *Id.* at 871, 890 P.2d 12; *RCW 26.16.140*. The monthly mortgage payments to U.S. Bank were $1,081.92 and reduced the principle balance each month by no less than $850 per month. (Trial Exhibit 23) Mr. St. George reduced the principle balance of the mortgage by using his after separation earnings by no less than $11,050 dollars in the 13 months before the home was sold. This amount should have either been credited to him in the calculation of the marital lien or should have been repaid to him at the closing of the sale of the home.

Mrs. St. George always took the position that Mr. St. George should be compensated for

these payments and agreed that he should be reimbursed. (RP 29-30 and 89-90) The court did not factor this reimbursement into the calculation of the equalization judgment/ marital lien in the Decree. This reimbursement was the expectation of the parties since the opening statements at trial and after Mrs. St. George's trial testimony that she agreed the reimbursement would occur. Had anyone suggested at trial the reimbursement would not occur then Mr. St. George would have an opportunity to provide additional evidence on the issue. This issue was not raised until Mrs. St. George failed to include the reimbursement in her proposed Findings of Fact and Conclusions of Law and Decree of Dissolution. It is not fair and equitable to ignore these separate property contributions when dividing the property of the parties.

Argument of Assignment of Error No. 7

As a result of the foregoing errors and the impact of the payments ordered by the trial court

by Mr. St. George to his wife, the trial court erred in failing to make a just and equitable division of assets and liabilities as required by R.C.W. 26.09.080. It was the stated intent of the court to reach an equal (50%) property division. The division shown at CP 110 is not near equal. When the burdens of maintenance are included as well as the proper calculation of the marital lien the overall financial situation is hardly equal for the remainder of their lives and is not even fair and just when ignoring the spousal maintenance that has been ordered. It appears as if a marital lien should be entered in Mr. St. George's favor. When the burdens of the maintenance payments, judgment interest and other errs above, are factored in to the financial situation it is clearly unjust and inequitable to Mr. St. George. This violates the directive or RCW 26.09.080 and the stated intent of the court.

A court's paramount concern when dividing the property of divorcing spouses is their

respective economic positions after the decree is entered. *In Re Marriage of Gillespie*, 89 Wash. App. 390, 399 948 P.2d 1338 (1997). It cannot be said that the economic position of Mr. St. George and Mrs. St. George approach equality and therefore the decision of the trial court needs to be corrected.

The court should have considered the following calculations to properly consider a fair and equitable division of the assets and correct the trial court errors:

(1) The Iowa National Life Insurance face value should be added to the community property awarded to the wife ($2,392);

(2) The name of the IRA should be amended to be Bank of America and add another $127 to total $1,127 awarded to wife;

(3) The long term tenured rebate should be removed from the valuation of the business awarded to husband and rather ordered to

be split 50/50 with wife if and when it is ever received;

(4) The proceeds of the Colorado Homes that were sold in the amount $40,000 should be attributed to the calculation as community property awarded to wife;

(5) The more than $60,000 removed from the community joint checking account on or about August 15, 2015 should be attributed to the award calculation of community property awarded to wife;

(6) Mr. St. George should be reimbursed $11,050 for the principle reduction in the mortgage attributed to the application of his post separation wages to mortgage payments over 13 months.

(7) Mr. St. George should be credited for paying the $13,000 community obligation to the Citibank card.

If these errors are all incorporated into the marital lien then Mrs. St. George has received

far more than one half of the marital assets as was the declared intent of the court and it would be necessary to award Mr. St. George an interest in the TIAA-CREF and or IRA accounts in the approximate amount of $52,500 and to order the long term tenured rebate to be split evenly if and when it is received. This remedy would eliminate the need for any marital lien or judgment. The mischaracterization of property is reviewed de novo and may not require proceedings on remand.

D. CONCLUSION

The decision of the trial court should be reversed with directions to make findings as to the issues raised herein. The trial court should be directed to recalculate the equalization judgment, if any, to apply the properly characterized awards of the Colorado Real Property proceeds and money Mrs. St. George removed from the joint checking account of the parties on or about August 15, 2014. In addition

the court should award the tenured rebate to Mr. St. George with the business. If any tenured rebate is received Mrs. St. George should receive one half under either the retained jurisdiction approach or the deferred distribution approach argued more fully above. Mr. St. George should be given credit for the reduction of the principle mortgage balance between separation and the sale of the home, as well as for payment of the Citibank balance of $13,000. The court should be required to deduct from the equalization award the $1,127 IRA and $2,392 Life Insurance Policy awarded to wife. This would require the court to award some additional portion of the community assets to Mr. St. George to compensate fairly for the equal division of the assets and debts before the court. This amount is thought to be approximately $52,500 as set forth more fully above.

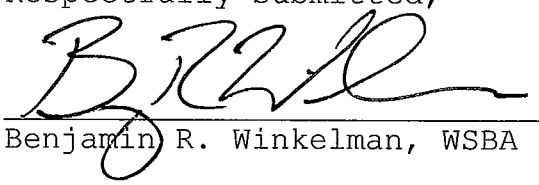
The court ordered spousal maintenance should be reduced to comply with the statutory

requirements and the court should be required to reconsider the spousal maintenance and enter findings consistent with the evidence in support of any award of maintenance.

Specific findings as to the method of valuation for the business as well as to support spousal maintenance should be made so that appellate review can occur if necessary.

Dated: July 22, 2016

Respectfully Submitted,

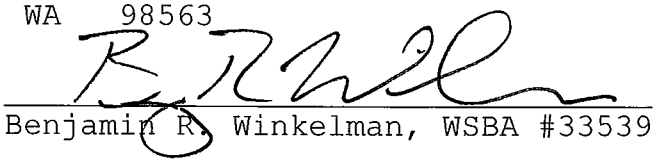


Benjamin R. Winkelman, WSBA #33539

CERTIFICATE OF MAILING

I certify that on July 22, 2016, I mailed a copy of the foregoing Brief of Appellant, by placing the same in the United States Postal Service, postage prepaid, to:

Mr. Curtis M. Janhunen
Attorney at Law
P.O. Box 111
Montesano, WA 98563



Benjamin R. Winkelman, WSBA #33539

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